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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Applications of WorldCom, Inc.	)	
and MCI Communications Corp.	)	CC Docket No. 97-211
for Transfer of Control of	)	
MCI Communications Corporation	)	

REPLY COMMENTS OF WORLDCOM, INC. AND MCI COMMUNICATIONS CORPORATION

Pursuant to Public Notice DA 98-820 in the above-captioned proceeding, WorldCom, Inc. ("WorldCom") and MCI Communications Corporation ("MCI") hereby submit their consolidated reply to the comments submitted by various parties[1] on the proposed protective order submitted by WorldCom and MCI April 27, 1998.

1. The commenters' principal objection to the proposed protective order is its provision restricting access to outside counsel of record, unaffiliated consultants and Commission officials actively involved in the proceeding. Commenters argue that in-house counsel should be included. GTE at 2-3, Bell Atlantic at 2-3, BellSouth at 2-3, CWA at 1-3, Sprint at 1-3. Some commenters argue that in-house economists and regulatory analysts should also be included. BellSouth at 3, CWA at 2. Simply Internet (at 1-2) would allow carte blanche access to any "individuals on staff" it claims have the necessary expertise.

It is important to understand the need to restrict disclosure of confidential documents to outside counsel and unaffiliated outside consultants. This case involves extremely sensitive

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[1] Comments were submitted by Simply Internet, Inc., GTE, BellSouth, Bell Atlantic, Communications Workers of America ("CWA") and Sprint.

competitive information, including customer names, customer usage patterns, and locations and traffic volumes. This information -- representing the most confidential and critical information to a competitive enterprise -- is central to the Submitting Parties' present and future operations, greatly exceeding the sensitivity of information involved in prior proceedings which the parties cite.[2] The Submitting Parties could suffer significant competitive and irreparable damage if this information were exploited by competitors in their business decisions and operations.

In many instances, inside counsel are also officers of the company, involved in strategic planning and business decisions. And even in-house counsel who are not officers, as well as in-house economists and regulatory analysts, are in constant contact with their co-employees, day in and day out, including those directly or indirectly engaged in marketing, strategic planning, pricing, promotional campaigns and rule and tariff preparation.[3] Further, given the present rapid rate of legal and regulatory developments in the telecommunications area, inside counsel, economists and regulatory analysts are frequently actively engaged in business planning, including policy planning, strategic planning and marketing decisions. While they may adhere to their obligation not to disclose the actual documents subject to a protective order, it is simply not plausible to believe that they can create a wall in their own minds, separating what they have read under the protective order from business decisions and advice they must give to their own employers and co-workers on a

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[2] For example, nothing in the Section 271 proceedings cited by BellSouth (Comment at 3, 4) involved a similar degree of business confidentiality.

[3] Sprint (at 4) asserts that its in-house counsel are "not engaged in making business decisions" and are not "involved in Sprint's "strategic planning efforts." But the question is whether those Sprint personnel who do make business decisions and strategic plans consult with Sprint's in-house counsel.

regular and on-going basis.

The futility of requiring in-house counsel to compartmentalize their minds was the basis for the Ninth Circuit's decision sustaining a protective order which restricted trade secret disclosure to outside counsel:

> The magistrate had to consider . . . whether Brown Bag's counsel could lock-up trade secrets in his mind, safe from inadvertent disclosure to his employer once he had read the documents. . . . . Knowledge of Symantec's trade secrets would place in-house counsel in the 'untenable position' of having to refuse his employer legal advice on a host of contract, employment, and competitive marketing decisions lest he improperly or indirectly reveal Symantec's trade secrets.

Brown Bag Software v. Symantec Corp., 960 F.2d 1465, 1471 (9th Cir. 1992), cert. denied, 506 U.S. 869 (1992). The same reasoning applies here.

The restriction has nothing to do with questioning the integrity of in-house personnel. The restriction is necessary because in-house personnel with access to competitors' trade secrets are placed in an inherently impossible position. They would be asked to create a wall in the middle of their minds, separating competitors' secrets from their day-to-day contact with their employers' business and their day-to-day business decision-making. This type of metaphysical compartmentalization is beyond the power of any human being.

We recognize that the restriction will pose some modest expense and inconvenience on some parties. Bell Atlantic, BellSouth and Sprint may have to retain outside counsel and independent consultants. However, these companies have used outside counsel in other Commission proceedings, and independent telecommunications consultants are widely available. If they really think that the merger would have the dire consequences they predict, the stakes and the balancing of the parties' interests certainly warrant the additional modest expense. And if they choose not to

incur this additional expense, their position will not go unrepresented, since GTE -- which has evidently spared no expense in opposing this merger -- is already utilizing outside counsel, as well as outside consultants.

It must be remembered that the commenters are seeking access to an enormous quantity of highly sensitive, vital competitive information, including customer names, usage patterns, locations and traffic volumes. As such, they are seeking to impose a significant business risk on WorldCom and MCI. In these circumstances, it is eminently reasonable to require the commenters to undergo some additional expense, where necessary to mitigate that risk.

The Commission must make a balancing judgment, and there are costs on both sides of the equation. If convenience to the opponents of the merger were the only consideration, there would be no restrictions on disclosure. If protection of confidential information were the only consideration, there would be no disclosure. Disclosure restricted to outside counsel and nonaffiliated consultants still imposes a risk on the Submitting Parties, but strikes a reasonable balancing judgment. Indeed, it was the judgment made by the Commission in TCI Satellite Entertainment, Inc. and Primestar, Inc., Order Adopting Protective Order, 1998 WL 166172 (DA 98-695, released April 10, 1998) ("TCI/Primestar"), where access to confidential information was restricted to outside counsel and nonaffiliated consultants. As the Federal Circuit commented in sustaining a similar restriction on disclosure imposed by the International Trade Commission:

> The Commission has resolved the difficult and controversial question of the role of in-house counsel by taking a conservative position on the side of optimum shielding of business information. Obviously, where confidential material is disclosed to an employee of a competitor, the risk of the competitor's obtaining an unfair business advantage may be substantially increased. The general Commission position is neither unreasonable nor arbitrary. It represents an appropriate balancing between the needs demanded by the Commission's process and the parties' need for

participation by its in-house personnel.

Akzo N.V. v. U.S. International Trade Commission, 808 F.2d 1471, 1483-84 (Fed. Cir. 1986), cert. denied, 482 U.S. 909 (1987). Similarly here, the disclosure restrictions utilized in TCI/Primestar represent an "appropriate balancing". The commenters offer no reason why the Commission's recent TCI/Primestar precedent, limiting disclosure to outside counsel and nonaffiliated consultants, should be almost immediately overturned.

The restriction should also be applied to public interest groups. In TCI/Primestar, the Commission limited disclosure to outside counsel and unaffiliated consultants even though a public interest group (Media Access Project) was a party. That precedent should be applied here. CWA is the only such group in this case that has exhibited an interest in analyzing the documents involved, and CWA has already used outside counsel and consultants in state commission proceedings concerning this merger.[4] CWA recommends language used in a protective order issued by the Pennsylvania Public Utility Commission, apparently designed to accommodate public interest groups. CWA at 2-3. However, the Pennsylvania provision contains significant ambiguities that

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[4] CWA has appeared through outside counsel in Pennsylvania, California and Virginia, and has identified an outside expert (Prof. Jeffrey Keefe of Rutgers University) in Pennsylvania. Joint Application of WorldCom, Inc. MCI Communications Corporation, MCI Telecommunications Corporation and MCI Metro Access Transmission Services for Approval of merger through the transfer of stock, Pa. PUC Docket Nos. A-312025F0002, A-310236F0004; In re Application of WorldCom, Inc. and MCI Communications Corporation for Approval to Transfer control of MCI Communications Corporation to WorldCom, Inc., Cal. PUC Application No. A.97-12-010; Petition of MCI Communications Corporation and WorldCom, Inc. for Approval of Agreement and Plan of Merger, Va. Corp.Comm'n Case No. PAU970052.

might be exploited by competitors.[5] Moreover, it is not limited to in-house personnel actively involved in the proceeding. If the Commission were inclined to make an exception for public interest groups, disclosure should be limited to situations where 1) neither the group nor its members are engaged in the telecommunications business, and 2) disclosure is limited to employees actively engaged in the proceeding. It should also be made clear that disclosure is subject to all the other restrictions of the order, including paragraph 5.

2. GTE (at 2-3) argues that disclosure should be expanded to other non-record outside counsel assisting in the proceeding. GTE has shown no need for such an open-ended expansion or provided any precedent to support it. GTE's present outside counsel of record is a competent firm, with experience in the telecommunications area. That firm has already signed comments for GTE extensively discussing Internet issues. There is no reason to believe it cannot -- with the help of independent outside consultants -- adequately analyze the documents at issue and present whatever arguments might be appropriate. Disclosure in TCI/Primestar was limited to outside counsel of record, and GTE has not shown why that precedent should be abandoned.

3. BellSouth objects to restricting disclosure to outside consultants "not employed by or affiliated in any way with any competitor of any Submitting Party." Proposed Order ¶ 3. That language comes directly from the Commission's Protective Order in TCI/Primestar, ¶ 3. It is

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[5] The Pennsylvania language leaves considerable room for interpretation as to whether a particular employee's duties are "related to" marketing and whether products or services within the scope of the employee's duties are "competitive." CWA's recommended provision also does not address the issue of whether an employee whose duties are "unrelated" to "competitive products" at the time he or she reads documents under the protective order might be transferred within the company the next day to duties that are related to competitive business decisions.

appropriate in this case, given the extreme sensitivity of the information involved. There would be no point in restricting disclosure to in-house personnel, if the restriction could be simply evaded by disclosure to experts affiliated with the competitor or involved in its business decisions. Significantly, BellSouth offers no substantive grounds for expanding this provision.

4. BellSouth also argues that the order should restrict only "specific" disclosure of the documents in outside counsel's discussion with clients -- thus presumably leaving the door open for "non-specific" disclosure. BellSouth at 3. In actual practice, the line between "specific" and "non-sepcific" disclosure would be very fuzzy. One may expect that at least some outside counsel would interpret it to allow communication to their clients of a considerable amount of sensitive information. There is simply no reason for allowing such a loophole, particularly in view of the extraordinary sensitivity of the documents at issue here.

5. Bell Atlantic objects to paragraph 7(d), requiring segregation of confidential from non-confidential material. Bell Atlantic at 4. That paragraph comes directly from the TCI/Primestar order (at ¶ 7d.). Procedures for segregating confidential from non-confidential information (such as filing confidential and redacted versions of pleadings, as the TCI/Primestar order contemplates (¶ 7(d)) are commonplace in administrative and judicial proceedings. Other parties to this proceeding have not objected to them; and they are essential to preserving confidentiality while allowing public disclosure to the maximum extent possible. They should not prevent any competent counsel from making an effective presentation of their client's case.

6. BellSouth objects to the provision that disclosure under the order does not waive privilege or other confidentiality protections (¶ 8). That provision is taken verbatim from the TCI/Primestar order (at ¶ 8). BellSouth's only possible reason for objecting to it would be a desire

to leverage disclosure under the protective order into unprotected disclosure in some other proceeding, by asserting in other proceedings that WorldCom and MCI have waived their rights. The Commission has no reason to assist BellSouth in this inappropriate endeavor.

7. Bell Atlantic (at 3) objects to paragraph 5 of the proposed order, allowing MCI or WorldCom to object to disclosure of certain documents to specific persons, subject to Commission review. That provision is based on well-established Commission precedent, having been included in the TCI/Primestar order (¶ 5) and the AT&T/McCaw order (¶ 3(c)).

8. CWA and Simply Internet argue that the order should allow parties to object to confidential classification of particular documents. CWA at 3, Simply Internet at 2. There is no reason for such a clause, since the order sets up a workable procedure for the parties' review of confidential documents. Resolution of disputes over whether particular documents should be within the protection of the order would simply consume the Commission's time and harass the Submitting Parties, without any discernible enhancement of the commenters' ability to provide the Commission with informed comment within the parameters of the protective order.

9. BellSouth (at 4) objects to the proposed acknowledgement form. But its only objection of substance is that the form limits disclosure to outside counsel. The form simply requires acknowledgement that the person signing it is among the categories of persons entitled to disclosure under paragraph 3. BellSouth and others have objected to the restrictions in paragraph 3, and we have responded. Given those restrictions, there can be no possible objection to requiring a person receiving disclosure to acknowledge that he or she complies with them.

10. Bell Atlantic (at 4-5) objects to paragraph 13, requiring return of the documents within two weeks after conclusion of the proceeding. This two-week time period was taken from

the TCI/Primestar order (¶ 11). We accept Bell Atlantic's point that appeals or additional proceedings might make extensions appropriate; but it might also be appropriate to tighten the restrictions at that time, particularly with regard to experts and consultants, since in an appellate proceeding the record would be fixed and the parties' only need for the documents would be to prepare legal briefs. Accordingly, we would agree to an amendment allowing parties to apply for an extension in view of judicial review proceedings, at which time the Commission could consider what extension might be permissible, and what additional restrictions might be appropriate.

11. Simply Internet argues that once the protective order is made effective, a new comment cycle should automatically be established. Simply Internet at 2-3. There is no need for an additional comment period. Once the documents have been inspected, the parties who have already filed comments on Internet issues are freely able to make ex parte presentations based on additional material in the documents. A new comment period would simply add to the delay with no corresponding benefit. It would allow additional parties who have not participated in earlier rounds to file comments; but there is no reason to do so, since persons interested in Internet issues have already had ample notice and ample opportunity to participate.

12. Both CWA and GTE argue that the order should allow them to use the documents in their conversations with DOJ. CWA at 3, GTE at 3-4. Such a provision would be entirely inappropriate. It is not this Commission's responsibility to decide what disclosure is appropriate and allowable in DOJ proceedings. Management of DOJ proceedings is DOJ's responsibility, not the Commission's. The Commission should not allow the parties to use its proceedings as a mechanism for bootstrapping discovery in proceedings before another agency.

13. Finally, GTE (at 4-5) requests the Commission to review other documents MCI and WorldCom have submitted to DOJ. That request is beyond the scope of the Commission's Notice, which requested comments on protection for documents requested by the Commission on April 21. If the Commission is inclined to consider GTE's request, we request additional opportunity to comment on it. In any event, the Commission has presumably requested comments on documents relating to certain Internet issues because it believes those issues involve a particular need for scrutiny and therefore warrant the significant risks to the Submitting Parties of competitive disclosure that are raised even under a protective order. It would be irresponsible to provide open-ended disclosure of all the DOJ documents, when no particular need for scrutiny has been shown.

CONCLUSION

The proposed protective order as submitted by WorldCom and MCI should be adopted, subject only to the revision described in paragraph 10 supra.

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Dated: May 13, 1998.

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